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In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

STORER BROADCASTING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the United States of America and the Federal Communications Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 24, 1955.

OPINION BELOW

The opinion of the Court of Appeals (App. 1a-12a) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1955 (App. 13a-14a). The jurisdiction of this Court is invoked under 5 U.S.C. 1040 and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Section 309(b) of the Communications Act of 1934, which requires a hearing before the denial of an application for a radio station license, prevents the Federal Communications Commission from adopting regulations fixing limitations on the multiple ownership of radio facilities.

STATUTE AND REGULATIONS INVOLVED

The pertinent sections of the Communications Act of 1934, as amended, 48 Stat. 1064, 50 Stat. 191, 66 Stat. 715, 47 U. S. C. 151, *et seq.* are as follows:

Section 4(i):

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions. [47 U. S. C. 154(i)]

Section 303:

> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
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> * * * * *
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: * * *
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> * * * * *
>
> (r) Make such rules and regulations and

prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, * * *. [47 U. S. C. 303]

Section 309(b):

If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * * [47 U. S. C. 309(b)]

The pertinent portion of Regulation Section 3.636 *Multiple Ownership*[1] provides:

> (a) No license for a television broadcast station shall be granted to any party (including all parties under common control *) if
>
> * * * * *
>
> (2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event con-

* The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

[1] The corresponding rules dealing with multiple ownership of standard broadcast stations and FM broadcast stations are contained in Sections 3.35 and 3.240. (47 C.F.R. 3.35, 3.240) They are the same as the television station rule except that the maximum limit was fixed at seven.

All three rules contain separate provisions against the ownership of more than one station serving substantially the same area. This provision was not challenged in the present case.

sider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.** [47 C.F.R. 3.636]

** In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

STATEMENT

This petition seeks review of a judgment invalidating that part of the so-called multiple ownership rules of the Federal Communications Commission which provides limitations on the number of broadcast stations in which any person may have an interest. Rules 3.35, 3.240, and 3.636, *supra*, pp. 4-5. Although the opinion and judgment of the court below is directed specifically to the rule relating to the television broadcast service (Rule 3.636), it necessarily has the effect of invalidating the similar limitations contained in the rules governing the standard broadcast (AM) and frequency modulation (FM) services, as the court below pointed out (App. 3a).

The action was initiated by a petition filed by Storer Broadcasting Company (hereinafter referred to as Storer) under Section 402(a) of the Communications Act of 1934 (47 U. S. C. 402(a)) and Section 4 of the Act of December 29,

1950, 64 Stat. 1129, 1130 (5 U. S. C. 1034) for review of an order[2] of the Commission adopted November 25, 1953, promulgating revised rules with respect to the multiple ownership of radio and television broadcast stations.

The rules in question limit the maximum number of interests which any one person may have in broadcast stations licensed by the Commission. They apply, respectively, to standard broadcast (AM) and frequency modulation (FM) radio stations, and television broadcast stations, and provide that one person may not have an interest in more than a total of seven AM stations, seven FM stations and five television stations.[3] Storer was itself the licensee in its own name of five AM stations, five FM stations, and three television stations. Its wholly owned subsidiaries were the licensees of two standard broadcast stations and two television stations. It was obviously affected by the rule; in fact, on the same day the Commis-

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[2] The Commission's Report and Order adopting the amended rules is at 18 F.R. 7796. It is printed in the Joint Appendix filed below and will be referred to there as "R. 20-38".

[3] At the time the petition for review was filed, the television limitation was five stations. Before the oral argument of the case, the television rule was amended to permit the acquisition of two additional television stations, so long as they were in the ultra high frequency (UHF) band. The television rule thus presently permits a total of seven television stations, only five of which may be in the very high frequency (VHF) band. The report adopting this amendment is at 19 F.R. 6099. Storer had five VHF stations when the present action was brought. When the latest amendment was adopted, it acquired two additional UHF stations by purchase.

sion adopted the amended multiple ownership rules, it dismissed without hearing a pending application by Storer for an additional television station in Miami (R. 10).[4]

The proceeding leading to the amendment of the rules to their present form was conducted in compliance with the rule making requirements of the Administrative Procedure Act, and no question of any procedural deficiency has been raised. A notice of proposed rule making (R. 17) was followed by the filing of comments of interested parties, including Storer under the name of Fort Industry Co. Those parties also participated in oral argument held by the Commission *en banc*.

The Commission's Report and Order adopting the amended rules discussed the various considerations underlying their adoption, including the Commission's authority to promulgate the rules (R. 21-24); the reasons for rejecting alternative proposals to give effect to additional considerations such as size, class and geographical location of stations (R. 26-27); the reason why the rules make no distinction between controlling and non-controlling interests (R. 27-28); and the specific maximum limitations imposed (R. 30-32). The "fundamental purpose" of the limitations was stated by the Commission to be "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any

[4] Storer did not appeal from this dismissal.

undue concentration of economic power contrary to the public interest." (R. 26)[5]

The Court of Appeals invalidated the provision which states that the Commission will in any event consider that there would be a concentration of control contrary to the public interest for any per-

[5] The Commission's Report and Order set forth the basic considerations of policy underlying the rules in the following terms (R. 26): "One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis. See *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470. This Commission has consistently adhered to the principle of 'diversification' in order to implement the Congressional policy against monopoly and in order to preserve competition. That principle requires a limitation on the number of broadcast stations which may be licensed to any person or to persons under common control. It is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees. The vitality of our system of broadcasting depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service. Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. In this connection, we wish to emphasize that by such rules diversification of program services is furthered without any governmental encroachment on what we recognize to be the prime responsibility of the broadcast licensee (See Section 326 of the Communications Act). It is to effect this purpose that the foregoing specific limitation on the number of stations that may be owned, operated or controlled by any person, has been included in the multiple ownership rules."

son to have an interest in more than the specified number of stations.[6] The court's decision is based upon the sole ground that Section 309(b) of the Communications Act requires a hearing before an application may be denied and that "the statutory provision means that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected." (App. 8a). The decision is not based upon rejection of the reasonableness of these particular rules or the adequacy of the record to support the specific provisions of the rules. In this connection, the opinion states that however laudable the Commission's policy may be, the Court is not concerned with the Commission's policy in passing upon applications, but is concerned with what purports to be a binding rule which denies an application for an available frequency sought by a citizen for a lawful use, and which does so without the full hearing on the application which the court thought was required by Section 309(b) of the Act (App. 11a).

REASONS FOR GRANTING THE WRIT

1. The decision below is a far-reaching one which imposes a drastic limitation upon the exercise of the Commission's rule making powers. It not only strikes down the particular rules involved, but also declares as a binding rule of law that the Commis-

[6] The court below made no express mention of the provision in the rules that all interests, except interests of less than 1% in corporations with more than fifty voting stockholders, will be taken into consideration.

sion cannot utilize its rule making authority to adopt general standards for the disposition of applications for radio and television licenses except in severely limited situations (see pp. 19-20, *infra*).[7] The question of the Commission's authority to adopt rules of general applicability which delineate standards of the public interest to be applied in individual licensing proceedings is of major importance in the administration of the Communications Act.[8] Commission rules govern the disposition of individual applications in the issuance of all classes of radio and television licenses, in both the broadcast and nonbroadcast services. The decision of the court below strikes

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[7] Since the decision in the instant case, the court below has, on the authority of the present case, reversed an order of the Commission issued without a hearing refusing to waive compliance with a rule limiting the nature of transmitting equipment. *City of New York Municipal Broadcasting System* v. *Federal Communications Commission*, May 5, 1955.

[8] The Attorney General's Committee on Administrative Procedure, in its monograph, *Administrative Procedure in Government Agencies*, Part 3, Federal Communications Commission (Senate Document No. 186, 76th Cong., 3d Sess.), stated at page 61: "The Communications Act of 1934 is replete with provisions vesting power in the Commission to make rules and regulations, and the Commission's authority in this respect covers the entire gamut of administrative legislation." And at page 63: "The entire process of licensing, both of stations and operators, is to be dealt with by Commission regulations."

The task force Report on Legal Services and Procedure prepared for the Commission on Organization of the Executive Branch of the Government in March 1955 states (p. 157), "In many respects, the power of agencies to issue rules is scarcely less important than the actions of the legislature itself. Rules, no less than statutes, lay down standards of conduct for all to whom their terms apply, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418 (1942)."

at the heart of this authority to effectuate the efficient administration of the Act through the use of general rules.

Putting aside for the moment the broad effect of the decision below on the Commission's general rule making authority, it clearly is of great importance even in the context of the particular rules which have been set aside here, substantially on the ground that the Commission lacks any power to make general rules in aid of its licensing functions. The multiple ownership rules have embodied for approximately fifteen years the Commission's view that multiple ownership interests above the permitted maximums are detrimental to the public interest.[9] These rules provide a framework, an-

[9] The Commission's multiple ownership rules date back to 1940, when a rule pertaining only to FM stations was adopted. This rule was similar in form to the present rules and provided that no person should own or control more than one station, except upon a showing that competition would be fostered or a distinct service rendered, and that an undue concentration of control would not result. It provided further that the ownership or control of more than six stations would be considered a concentration of control inconsistent with the public interest. In 1941 a substantially similar rule was adopted for television stations. The maximum number was originally set at three, and was raised to five in 1944. A multiple ownership rule for AM stations, adopted in 1943, contained only the restriction provided by the two earlier rules against ownership or control of more than one station serving the same area, and did not contain a maximum limitation. The changes in the rules made in the November 1953 amendment adopted a maximum of seven instead of six in the FM service, fixed a maximum in the AM service for the first time, and extended the rules to include minority as well as controlling interests. The television maximum was not changed at that time but, as is pointed out in footnote 3, *supra*, p. 6, has since been raised to seven.

nounced in advance, for the healthy, competitive development of radio and television broadcasting in the United States.

As this Court has stated, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 203. Here, acting on the basis of its experience with a problem peculiarly suited to the exercise of that informed expert judgment which it was created to exercise, the Commission has determined that multiple ownership can best be handled by regulation. Returning the problem to the uncertainties of case-by-case adjudication would open the door to individual hearings in a realm where particular evils are not readily susceptible of proof on an individual case basis.[10] The multiple ownership rules are soundly based on considerations within the competence of the Commission in granting licenses for the use of scarce channels of radio communication. The court below did not find that they were not.

The rules have two bases. First, they serve to preserve the fullest measure of economic competition and to prevent the development of any trend toward monopoly. In this sense, the rules are an ap-

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[10] The preventative role of the rules is similar to that of 15 U.S.C. 19, where Congress announced a general rule prohibiting interlocking directorates in certain situations. See *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614 S.D. N.Y.).

plication by the Commission of the same basic policy considerations underlying the Federal antitrust laws, although, of course, they are not a direct application of those laws and do not purport to define a violation of the antitrust laws.[11] The authority of the Commission to provide for the fullest use of radio in the public interest through a licensing policy reflecting the basic concept of competition is well established. *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28 (C.A. D. C.). In preserving competition by preventing aggregations of control which, while not illegal, tend toward concentration of economic power contrary to the public interest, the multiple ownership rules represent a particularization of the Commission's conception of the public interest sought to be safeguarded by Congress in enacting the Communications Act.

Second, and of at least equal importance as a foundation for the rules, is their function of implementing the Commission's settled policy in licens-

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[11] By Section 313 of the Communications Act, Congress expressly made the antitrust laws applicable to persons engaged in radio communications, and authorized the courts to revoke the license of any person found guilty of violating the antitrust laws. In Section 311, it directed the Commission to refuse a station license to any person whose license has been revoked by a court under Section 313. These provisions leave no room for doubt that Congress intended to adopt a policy of free competition for the radio broadcasting industry. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137; *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474.

ing broadcast station of promoting and insuring diversification of program and service viewpoints. As the Commission's report states, it is a fundamental purpose of the limitation on the multiple ownership of stations to promote diversification of ownership interests in order to increase diversification of program and service viewpoints (R. 26). The principle of diversification is one which the Commission has consistently applied in a variety of contexts, and its adherence to this policy has received judicial approval. Thus, although newspapers have never been barred as a class, in recognition of the fact that newspapers also constitute a critical avenue of communication to the public which, while dissimilar to radio in many respects, also performs similar functions of imparting news and opinion, the Commission has consistently favored applicants without newspaper connections in selecting among competing applicants for a license. This policy has been sustained upon review. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 189 F. 2d 677 (C.A. D.C.), certiorari denied, 342 U. S. 830.[12] In comparative hearings between qualified applicants, the Commission has also followed the consistent practice of considering whether an applicant already had other radio interests, even though such interests are permitted by the maximum limitations in the multiple owner-

[12] As was there pointed out, this Court has stated in *Associated Press* v. *United States*, 326 U.S. 1, 20, that the First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.

ship rules. See, e.g., *Bamberger Broadcasting Service, Inc.*, 11 F. C. C. 211, 222; *Plains Radio Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 359 (C.A. D.C.).

However, the decision below has a far greater impact than merely invalidating one set of rules. The court below, while specifically refusing to consider the reasonableness and validity of the policy which the rules enunciate, held them invalid on the sole ground that Section 309(b) of the Communications Act requires an adjudicatory hearing in every case where a citizen seeks a license for the lawful use of an available frequency. This broad holding affects the Commission's regulations governing the licensing of stations in all classes of service, including the many safety and special non-broadcast services, as well as stations licensed to broadcast directly to the general public. Section 309(b) applies equally to the issuance of licenses for all such services. The Commission must pass upon thousands of applications each year, covering the entire range of the use of radio signals for such diverse purposes as broadcasting to the public, fire and police services, and industrial uses. The publication of standards under which these applications will be considered is a convenience to the public and a means by which the Commission can handle the great volume of work with efficiency.

2. The holding below is contrary to every relevant decision of this Court and the lower courts on the question of the Commission's authority to promulgate rules of general applicability which

govern the disposition of individual applications. It has long been established that the Commission has authority, in conjunction with its licensing functions, to adopt general rules declarative of standards relevant to the public interest which govern the grant or denial of individual license applications. This authority is specifically given in Sections 4(i) and 303 of the Act, *supra*, p. 2. It has also been established that such rules may go beyond the purely technical aspects of radio transmissions, and that the denial of an application because of conflict with such a rule, without reopening all of the considerations going into the rule on a case-to-case basis, is not a violation of the right to a hearing on an application accorded by Section 309(b) of the Communications Act. A hearing would of course be held, where appropriate, on the question of whether the application is in fact in violation of the rule.

The leading case on the Commission's rule making power is *National Broadcasting Co.* v. *United States*, 319 U.S. 190, which sustained the Commission's Chain Broadcasting Regulations. The Chain Broadcasting Regulations were designed to eradicate certain practices in network broadcasting which the Commission found to be inimical to the public interest. They are exactly the same in their application to license applications as the multiple ownership rules, and provide that "no license shall be granted" to stations or applicants having certain contractual relationships with network organizations. That the network rules, adopted in

1941 and sustained by this Court in the *National Broadcasting Co.* case, *supra*, operate precisely as do the present rules, which the lower court struck down because of an asserted conflict with the hearing requirement of Section 309(b), is made clear by this Court's decision in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, holding the Chain Broadcasting Regulations directly reviewable prior to the denial of any individual license application. The Government had contended that the Chain Broadcasting Regulations were not directly reviewable because they were merely "announcements of policy." But this Court rejected that contention in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, holding those rules reviewable on the ground that they were "rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more." (316 U.S. at 418.)[13] Moreover,

[13] The Court's opinion further states on the question of the effect of the rules as requiring the denial of applications which are inconsistent with them (316 U.S. at 422): "The Commission argues that, since its Report characterized the regulations as announcements of policy, the order promulgating them is no more subject to review than a press release similarly announcing its policy. Undoubtedly, regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one 'which we will follow in exercising our licensing power,' they must be taken by those entitled to rely upon them as what they pur-

Judge Learned Hand stated in the District Court opinion sustaining the Chain Broadcasting Regulations, with respect to the same contention that the Commission's duty to give a hearing before denying an application meant that the Commission could not make rules of general applicability (*National Broadcasting Co.* v. *United States*, 47 F. Supp. 940, at 945 (S.D. N.Y.)):

> The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. * * *

The Commission's authority to make rules which are binding in licensing proceedings has also been sustained in several other cases. In *Federal Communications Commission* v. *American Broadcasting Company*, 347 U.S. 284, 289, this Court recognized the Commission's authority to adopt rules providing that an application for license or renewal of license would not be granted where a

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port to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them. The Commission's contention that the regulations are no more reviewable than a press release is hardly reconcilable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant."

policy of broadcasting lotteries is followed. And, again, the Commission's rules providing that a license will not be granted upon the transfer of a station, where the transferor reserves any right of re-assignment of the license or a right to use the facilities of the station assigned, have also been upheld. *Felman* v. *United States* (unreported, Civil No. 49 C 227, N.D. Ill.), affirmed, 339 U.S. 973. Finally, in *Logansport Broadcasting Corporation* v. *United States,* 210 F. 2d 24, the Court of Appeals for the District of Columbia itself sustained the Commission's rules providing for a nation-wide system of allocating television frequencies. These rules require that applications for licenses not conforming to the overall plan be automatically dismissed.[14] See also *Heitmeyer* v. *Federal Communications Commission,* 95 F. 2d 91, in which the Court of Appeals reversed a Commission opinion denying an application where the applicant proposed to use borrowed funds, and the court criticized the Commission for its failure to promulgate any general rule as to minimum financial qualifications of applicants for licenses.

The opinion of the court below in the instant case concedes that there are some situations where an application may be rejected without a hearing, despite the hearing requirement of Section 309(b).

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[14] In its opinion in the present case, the court below recognized the rules involved in the *Logansport* case as an exception to the hearing requirement but failed to indicate in what respect the power of the Commission with respect to those rules differed from its power with respect to multiple ownership.

These situations are said to be those cases where an admitted alien applies (in violation of Section 310(a) of the Act), where an application seeks a license for an unlawful use (and the court here refers to the lottery rules), or where an applicant applies for a frequency at a location to which that frequency has not been assigned under the television assignment plan. These purported exceptions to the court's stated general rule cannot be distinguished, either legally or logically, from the multiple ownership rules.

3. The power to make effective rules which are more than precatory announcements of policy is a necessary adjunct of the licensing function, and the discretion of an administrative agency to utilize general rules instead of individual proceedings where the purpose is to cover matters of general applicability is well recognized. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194. Impairment of the role played by rules in setting forth, in advance of the filing of individual applications, the standards under which they will be granted, and the resulting necessity of holding hearings on matters which may appropriately be covered by general rules would impair the administrative process. The real question in this case is whether, where the Commission has authority to deny a license upon the basis of considerations within its competence, it may exercise that power through a rule of general applicability adopted by the rule making process authorized by Congress. We submit that the question is one of

general significance and that the decision below warrants review by this Court.

CONCLUSION

The decision below is contrary to established precedent on a question of basic importance to the administration of the Communications Act of 1934. It is respectfully submitted that the petition for certiorari should be granted.

SIMON E. SOBELOFF,
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MAY, 1955.